

undertaken, including indicating the content of the record on review, the briefs to be filed and the time and manner for filing the briefs, record and other documents.

D. Any party to the action, or the attorney general on behalf of the state, may appeal to the supreme court as provided by law.

E. In all appeals that are taken pursuant to this section, the party adverse to the commission or seeking to vacate or set aside an order of the commission must make a clear and satisfactory showing that the order is unlawful or unreasonable.

F. Except as provided by this section, no court of this state has jurisdiction to enjoin, restrain, suspend, delay or review any order or decision of the commission involving public service corporations and relating to rate making or rate design pursuant to §§ 40-243, 40-246, 40-250 and 40-251, or to enjoin, restrain or interfere with the commission in the performance of its official duties, and the rules, orders or decrees fixed by the commission remain in force pending the decision of the courts, but a writ of mandamus shall lie from the supreme court to the commission in cases authorized by law.

Added by Laws 1991, Ch. 247, § 2, eff. Jan. 1, 1992.

#### Historical and Statutory Notes

Laws 1991, Ch. 247, § 5, subsec. A provides: limitation; court of appeals" was substituted for the previous section heading.

"A. Section 40-254.01, Arizona Revised Statutes, as added by this act, is effective from and after December 31, 1991."

#### 1991 Reviser's Note:

Pursuant to authority of § 41-1304.02, "Action to set aside or modify certain commission orders;

### ARTICLE 4. CERTIFICATES OF CONVENIENCE AND NECESSITY AND FRANCHISES

#### § 40-281. Certificate required before construction by public service corporation; exceptions; complaint by corporation injuriously affected by construction hearing; exclusive franchise or monopoly

##### Failure of Conditional Enactment

*Laws 1985, Ch. 304, § 5 conditionally amended this section (see Main Volume).  
For conditional enactment provision and information as to the nonoccurrence of the condition, see Historical Note following § 40-201.*

#### Notes of Decisions

Contiguous areas, certificates 6.5  
Electric utilities, certificates 7.5

#### 4. Extensions

Electrical utility was entitled to expand anywhere within city limits for which it was certificated, including further expansion of city limits, without prior permission from Corporation Commission and was allowed to extend service to area contiguous to its certificated area if contiguous area was not already served by public service corporation. Electrical Dist. No. 2, Pinal County, Ariz. v. Arizona Corp. Com'n (1987) 155 Ariz. 252, 745 P.2d 1383.

Electrical utility's certificate which allowed it to serve both town and city was not broad enough to include subdivision located between city and town, but not within city limits of either, and, therefore, utility was required to seek Corporation Commission's approval before it could provide service to subdivision. Electrical Dist. No. 2, Pinal County, Ariz. v. Arizona Corp. Com'n (1987) 155 Ariz. 252, 745 P.2d 1383.

6.5. — Contiguous areas, certificates  
Restaurant was not in area contiguous to electrical utility's certificated area where restaurant was located 50 feet outside city limits and thus was not in actual contact with or touching city limits. Electrical Dist. No. 2, Pinal County, Ariz. v. Arizona Corp. Com'n (1987) 155 Ariz. 252, 745 P.2d 1383.

#### 7.5. — Electric utilities, certificates

Electrical utility had right of first refusal in areas covered by its certificate, which extended to city limits of towns served by utility and to areas contiguous to city limits. Electrical Dist. No. 2, Pinal County, Ariz. v. Arizona Corp. Com'n (1987) 155 Ariz. 252, 745 P.2d 1383.

#### 7.5. — Electric utilities, certificates

Electrical utility had right of first refusal in areas covered by its certificate, which extended to city limits of towns served by utility and to areas contiguous to city limits. Electrical Dist. No. 2, Pinal County, Ariz. v. Arizona Corp. Com'n (1987) 155 Ariz. 252, 745 P.2d 1383.

Robbins Const. Co. (App.1987) 153 Ariz. 486, 737 P.2d 1385.

### 3. Indemnification

For purposes of entitling electric company to indemnity from subcontractor whose worker was injured when boom of crane with which worker was in physical contact with swung into energized overhead power line, under the High Voltage Pow-

er Lines and Safety Restrictions Act, fact of accident alone showed it was possible for crane to be brought within six feet of power line and crane was capable of swinging within ten feet of power line, so as to support requiring subcontractor to indemnify utility on worker's claim. Tucson Elec. Power Co. v. Kokosing Const. Co., Inc. (App.1988) 159 Ariz. 317, 767 P.2d 40.

### § 40-360.45. Exemptions

This article does not apply to construction, reconstruction, operation or maintenance by an authorized person of overhead electrical or communication circuits or conductors and their supporting structures or electrical generating, transmission or distribution systems or communication systems.

Amended by Laws 1986, Ch. 181, § 2.

## ARTICLE 7. RATES AND RATE SCHEDULES

### § 40-361. Charges by public service corporations required to be just and reasonable; service and facilities required to be adequate, efficient and reasonable; rules and regulations relating to charges or service required to be just and reasonable

#### United States Supreme Court

Federal abstention, utility challenge to state ratemaking, see New Orleans Public Service, Inc. v. Council of New Orleans, 1989, 109 S.Ct. 2506, 491 U.S. 350, 105 L.Ed.2d 298, appeal after remand 911 F.2d 993, certiorari dismissed 112 S.Ct. 411, 116 L.Ed.2d 357.

Preemption, public utilities retail ratemaking, passing through FERC approved interstate whole-

sale rates and allocation of entitlement power, see Nantahala Power and Light Co. v. Thornburg, 1986, 106 S.Ct. 2349, 476 U.S. 953, 90 L.Ed.2d 943, on remand, 318 N.C. 277, 347 S.E.2d 460.

Takings clause, public utilities, cost of construction as part of rate base, see Duquesne Light Co. v. Barasch, 1989, 109 S.Ct. 609, 488 U.S. 299, 102 L.Ed.2d 646.

### § 40-368. Sliding scale of charges

#### Failure of Conditional Enactment

*Laws 1985, Ch. 304, § 11 conditionally amended this section (see Main Volume). For conditional enactment provision and information as to the nonoccurrence of the condition, see Historical Note following § 40-201.*

### § 40-369. Limitations on relative charges by telecommunications corporations for long-distance and short-distance messages

#### Failure of Conditional Enactment

*Laws 1985, Ch. 304, § 12 conditionally amended this section (see Main Volume). For conditional enactment provision and information as to the nonoccurrence of the condition, see Historical Note following § 40-201.*

## ARTICLE 8. ANNUAL ASSESSMENTS

### § 40-406. Exclusive procedure to determine legality of assessments and to recover assessments paid

A. The procedure provided in this article for determining the lawfulness of statements and the recovery of payments made pursuant to statements of assessments shall be exclusive of all other remedies and procedures.

## **APPENDIX #4**

BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

JAN 16 1991

MARCIA WEEKS  
CHAIRMAN  
RENZ D. JENNINGS  
COMMISSIONER  
DALE H. MORGAN  
COMMISSIONER

DOCKETED BY

JA

IN THE MATTER OF THE APPLICATION )  
OF THE ARIZONA RSA 3 LIMITED )  
PARTNERSHIP (FORMERLY THE ARIZONA )  
RSA 3 SOUTH LIMITED PARTNERSHIP) )  
FOR A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY TO )  
CONSTRUCT AND OPERATE A CELLULAR )  
TELEPHONE SYSTEM TO SERVE THE )  
ARIZONA 3-NAVAJO RURAL SERVICE AREA )  
AND FOR APPROVAL OF ITS WHOLESALE )  
TARIFF. )

DOCKET NO. U-2554-90-092

DECISION NO. 57226

OPINION AND ORDER

DATE OF HEARING: December 19, 1990

PLACE OF HEARING: Phoenix, Arizona

PRESIDING OFFICER: Cheryl K. Hachman

APPEARANCES: JOHNSTON, MAYNARD, GRANT & PARKER, by Mr. Michael Grant, on behalf of the Arizona RSA 3 Limited Partnership;

STEPTOE & JOHNSON, by Mr. Barry J. Dale, on behalf of Smith Bagley, Inc.; and

Ms. Elizabeth A. Kushibab, Staff Attorney, Legal Division, Arizona Corporation Commission, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

FINDINGS OF FACT

1. On April 4, 1990, the Arizona RSA 3 South Limited Partnership (the "South Partnership") filed with the Arizona Corporation Commission an application for a certificate of public convenience and necessity ("certificate") authorizing it to construct, operate and maintain cellular radio facilities for the

1 construct, operate and maintain cellular radio facilities for the  
2 provision of telephone service, as a common carrier, in the southern  
3 portion of Navajo County, Arizona.

4 2. The southern portion of Navajo County is part of an area  
5 designated by the Federal Communications Commission ("FCC") as the  
6 Arizona 3-Navajo, Arizona Rural Service Area, Cellular Market No.  
7 320 (the "Navajo RSA"), which consists of all of Navajo and Apache  
8 Counties, Arizona.

9 3. The cellular affiliates of the four wireline carriers who  
10 could obtain "Block B" authority from the FCC for the Navajo RSA  
11 organized two limited partnerships to provide service within the  
12 Navajo RSA: (a) the South Partnership, with Contel Cellular, Inc. as  
13 the general partner, which was organized to provide service in the  
14 southern portion of Navajo County; and (b) the Arizona RSA 3 North  
15 Limited Partnership (the "North Partnership"), with Universal  
16 Cellular for RSA #3-A, Inc. as the general partner, which was  
17 organized to provide service in Apache County and the northern  
18 portion of Navajo County.

19 4. On September 29, 1989, the FCC granted construction  
20 permits authorizing construction of cellular facilities in the  
21 Navajo RSA to the South and North Partnerships.

22 5. After the South Partnership's application for a  
23 certificate was filed, the partners decided to "merge" it with the  
24 North Partnership and form a new partnership, the Arizona RSA 3  
25 Limited Partnership (the "RSA 3 Partnership"), to provide service  
26 within all of the Navajo RSA.

27 6. The RSA 3 Partnership, a Delaware limited partnership  
28 authorized to do business in Arizona, is comprised of Universal

1 Cellular for Arizona RSA # 3-B, Inc., an Arizona corporation  
2 ("Universal"), as general partner and the following limited  
3 partners: Contel Cellular, Inc. ("Contel"), a Delaware corporation  
4 authorized to do business in Arizona; US West NewVector Group, Inc.  
5 ("NewVector"), a Colorado corporation authorized to do business in  
6 Arizona; and CP National Corporation, a California corporation  
7 authorized to do business in Arizona.

8 7. On October 26, 1990, the RSA 3 Partnership filed an  
9 amended application to reflect the change in the applicant and the  
10 geographic scope of the proposed certificate.

11 8. With the filing of the amended application the RSA 3  
12 Partnership also filed its proposed wholesale tariff and a request  
13 for permission to maintain its books and records in accordance with  
14 generally accepted accounting principles, rather than the Uniform  
15 System of Accounts.

16 9. Notice of the application for a certificate was published  
17 in a newspaper of general circulation in the Navajo RSA on December  
18 11, 1990.

19 10. By a Procedural Order issued on October 18, 1990, the  
20 Commission granted the unopposed application to intervene of Smith  
21 Bagley, Inc. ("SBI").<sup>1</sup>

22 11. The FCC has previously found that a public need exists for  
23 cellular telephone service throughout the country, including the  
24 Navajo RSA.

---

25 <sup>1</sup> The FCC has determined that the market of the cellular  
26 telephone industry will be a duopoly of primary carriers in each  
27 service area: a "Block A" or "non-wireline" licensee and a "Block  
28 B" or "wireline" licensee. SBI is the non-wireline licensee in  
the Navajo RSA and was granted a certificate in Decision No. 57073  
(August 22, 1990).

12. On December 4, 1990, the FCC granted the RSA 3 Partnership's application to transfer the construction permits from the North and South Partnerships to the RSA 3 Partnership.

13. Under the FCC's regulations, the RSA 3 Partnership must obtain a certificate, complete construction of a cell site and begin providing service in an FCC-approved cellular geographic service area ("CGSA") within the Navajo RSA by March 28, 1991.

14. Although the North Partnership had an authorized CGSA for a 60-mile corridor along Interstate 40, which would include Holbrook and Navajo, Arizona, the RSA 3 Partnership has decided to provide service in a different area and in the near future will apply for a CGSA centered around Winslow, Arizona with a corridor along Interstate 40 from Winslow to Holbrook, Arizona.

15. Initially, the RSA 3 Partnership intends to provide cellular telephone service via one cell site near Winslow, Arizona.

16. The RSA 3 Partnership will not require a franchise for the use of public streets, highways and rights-of-way for cellular facilities.

17. For the "land-line" portion of its service, the RSA 3 Partnership will enter into an interconnection agreement with The Mountain States Telephone and Telegraph Company, dba US West Communications ("US West") and will pay charges to US West pursuant to that agreement.

18. Consistent with cellular service delivery in other metropolitan and rural service areas in Arizona, the RSA 3 Partnership will offer its service to resellers through its wholesale tariff and will purchase its service at its tariffed wholesale rates and resell to the public.

1 19. The RSA 3 Partnership estimates that it will provide  
2 service to approximately 88 retail customers during the first full  
3 year of operations and that by the end of the fifth year it will  
4 provide service to approximately 471 customers.

5 20. The RSA 3 Partnership agreed to negotiate an NXX placement  
6 agreement with SBI, if necessary.

7 21. If granted a certificate, the RSA 3 Partnership will begin  
8 construction of its cellular facilities immediately so that it can  
9 complete construction before its FCC construction permit expires.

10 22. If granted a certificate, the RSA 3 Partnership will  
11 familiarize itself with the statutes governing public service  
12 corporations and the rules and regulations of this Commission and  
13 intends to abide by them.

14 23. A waiver of A.A.C. R14-2-510(G) in favor of generally  
15 accepted accounting principles would enable the managing partner of  
16 the RSA 3 Partnership to use the same accounting standards presently  
17 used by it and the other partners and has been granted, upon  
18 request, to several other entities engaged in providing competitive  
19 telecommunications services in Arizona. E.g., Yuma, Arizona RSA Ltd.  
20 P'ship., Decision No. 57107 (September 21, 1990).

21 24. If granted a certificate, the RSA 3 Partnership will file  
22 annual reports and maintain its records so that its wholesale  
23 revenues, expenses and other pertinent data can be readily  
24 determined when necessary.

25 25. The construction and initial operating costs of the RSA 3  
26 Partnership will be financed through the equity capital  
27 contributions of its partners, and the general partner, through its  
28 parent, has secured a back-up line of credit in the amount of



1 approximately \$1.5 million for construction and operating purposes,  
2 if necessary.

3 26. Either directly or indirectly, each of the partners  
4 involved in the RSA 3 Partnership have extensive telecommunications  
5 experience and, with respect to cellular telephone service in  
6 particular, NewVector and Contel either hold or are involved in  
7 entities which hold certificates for cellular service in Arizona,  
8 while one of Universal's affiliates manages numerous cellular  
9 systems in metropolitan and rural areas throughout the country.

10 27. In granting and approving the transfer of the construction  
11 permits to the RSA 3 Partnership, the FCC concluded that it was  
12 legally, financially, technically and otherwise capable of  
13 constructing and operating a cellular telephone system.

14 28. The RSA 3 Partnership's proposed wholesale tariff  
15 (including the revisions filed at the hearing) sets forth its  
16 maximum rates for access and other services to resellers and  
17 includes a provision which would permit changes in the rates to  
18 reflect discounts within the range of 0 to 50 percent, on 15 days  
19 notice and filing with the Commission.

20 29. The RSA 3 Partnership's proposed maximum rates were based  
21 on several assumptions concerning growth, revenue and expense levels  
22 and are substantially similar to the maximum wholesale rates charged  
23 by other cellular telephone companies, including companies in  
24 Arizona.

25 30. The RSA 3 Partnership's proposed wholesale tariff, as  
26 revised at the hearing, does include an effective price sheet  
27 containing its initial rate discounts.

1        31. The RSA 3 Partnership expects that its cellular operations  
2 will not provide a return (net operating income) until the seventh  
3 or eighth year of operations.

4        32. Negative cash flows and net operating losses are typically  
5 experienced by cellular telephone systems during their initial years  
6 until, due to increased demand for the service and customer growth,  
7 revenues are sufficient to cover the cost of providing service.

8        33. On December 17, 1990, the Commission's Utilities Division  
9 ("Staff") filed herein a Staff Report which, as amended during the  
10 hearing, recommended that the Commission grant the application of  
11 the RSA 3 Partnership for a certificate and in connection therewith  
12 order the RSA 3 Partnership to:

- 13            (a) provide 30-days notice to the Commission of the date  
14                when it intends to begin providing service;  
15            (b) file with and request Commission approval of any  
16                intercarrier agreements containing rates and charges  
17                for affiliated roamer service;  
18            (c) file a copy of any interconnection agreements it may  
19                enter into with any land-line carriers within 15  
20                days of execution; and  
21            (d) notify the Commission of its authorized CGSA and any  
22                changes thereto which may be made in the future.

23        34. With respect to the RSA 3 Partnership's proposed tariff,  
24 Staff recommended that the Commission approve the tariff, as revised  
25 at the hearing, and that within 15 days of the effective date hereof  
26 the RSA 3 Partnership refile its tariff with a proposed effective  
27 date.  
28

1 35. Staff also recommended that the Commission grant the  
2 request of the RSA 3 Partnership for a waiver of A.A.C. R14-2-510(G)  
3 in favor of the use of generally accepted accounting principles and  
4 order the RSA 3 Partnership to:

5 (a) separate its wholesale revenues and expenses on an  
6 Arizona jurisdictional basis for record keeping,  
7 data submissions and reports to be filed with the  
8 Commission; and

9 (b) provide Staff with information concerning its  
10 accounting and allocation methodologies within 90  
11 days of the effective date of this Decision.

12 CONCLUSIONS OF LAW

13 1. The RSA 3 Partnership is a public service corporation  
14 within the meaning of Article XV of the Arizona Constitution and  
15 A.R.S. § 40-281.

16 2. The Commission has jurisdiction over the RSA 3 Partnership  
17 and of the subject matter of the application.

18 3. There exists a public necessity for a cellular telephone  
19 system within the Navajo RSA.

20 4. The RSA 3 Partnership is a fit, willing and able party to  
21 provide such cellular telephone service.

22 5. The RSA 3 Partnership should be granted a certificate  
23 authorizing it to construct, operate and maintain cellular radio  
24 facilities for provision of telephone service as a common carrier  
25 within the Navajo RSA, as authorized by the FCC.

26 6. As unopposed initial rates for service and with the  
7 modifications submitted at the hearing, the proposed rates and  
28

1 charges of the RSA 3 Partnership for wholesale cellular telephone  
2 service are just and reasonable.

3 7. The RSA 3 Partnership should be granted permission to keep  
4 its books and records in accordance with generally accepted  
5 accounting principles.

6 8. Staff's recommendations, as set forth in Findings of Fact  
7 Nos. 33, 34 and 35, were not opposed and should be adopted.

8 ORDER

9 IT IS THEREFORE ORDERED that the Arizona RSA 3 Limited  
10 Partnership be, and hereby is, granted a certificate of public  
11 convenience and necessity authorizing it to construct, operate and  
12 maintain cellular radio communications facilities for the provision  
13 of telephone service as a common carrier within the Navajo RSA.

14 IT IS FURTHER ORDERED that the certificate of public  
15 convenience and necessity granted hereinabove be, and hereby is,  
16 subject to the condition that it is contingent upon, coextensive  
17 with and identical to the authority granted to the Arizona RSA 3  
18 Limited Partnership by the Federal Communications Commission.

19 IT IS FURTHER ORDERED that the Arizona RSA 3 Limited  
20 Partnership be, and hereby is, authorized and directed to file,  
21 within 15 days of the effective date hereof, its initial tariff  
22 containing the revisions submitted at hearing, with a proposed  
23 effective date.

24 IT IS FURTHER ORDERED that said tariff and the rates and  
25 charges contained therein shall be effective for all wholesale  
26 services provided by the Arizona RSA 3 Limited Partnership until  
27 otherwise ordered by the Arizona Corporation Commission.  
28

1 IT IS FURTHER ORDERED that the Arizona RSA 3 Limited  
2 Partnership shall file with the Arizona Corporation Commission a  
3 notice of intent to provide service 30 days prior to commencement of  
4 service (wholesale or resale) to any customers.

5 IT IS FURTHER ORDERED that the Arizona RSA 3 Limited  
6 Partnership shall promptly notify the Arizona Corporation Commission  
7 of its cellular geographic service area and any changes therein as  
8 authorized by the Federal Communications Commission, by filing for  
9 inclusion in its tariff initial and revised service area maps, in  
10 accordance with the provisions of A.R.S. § 40-367.

11 IT IS FURTHER ORDERED that the Arizona RSA 3 Partnership be,  
12 and hereby is, authorized and directed to maintain its books and  
13 records in accordance with generally accepted accounting principles.

14 IT IS FURTHER ORDERED that the Arizona RSA 3 Limited  
15 Partnership shall establish and maintain separate accounts for its  
16 Arizona jurisdictional wholesale revenues and expenses and provide  
17 said revenues and expenses in its data submissions and financial  
18 reports to the Arizona Corporation Commission.

19 IT IS FURTHER ORDERED that within 90 days of the effective date  
20 hereof the Arizona RSA 3 Limited Partnership shall file information  
21 concerning its accounting and allocation methodologies.

22 IT IS FURTHER ORDERED that the Arizona RSA 3 Limited  
23 Partnership shall file herein any interconnection agreements it may  
24 enter into with local and interexchange telecommunications carriers  
25 within 15 day of execution.

26 IT IS FURTHER ORDERED that, at the time of filing, the Arizona  
27 RSA 3 Limited Partnership shall serve a copy of its interconnection  
28 agreement with US West Communications, Inc. on Smith Bagley, Inc.

1 IT IS FURTHER ORDERED that the Arizona RSA 3 Limited  
2 Partnership shall file any intercarrier agreements containing rates  
3 and charges for roamer or other wholesale services in accordance  
4 with the provisions of A.R.S. §§ 40-365, 40-366 and 40-367.

5 IT IS FURTHER ORDERED that this Decision shall become effective  
6 immediately.

7 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

8  
9   
CHAIRMAN

COMMISSIONER

  
COMMISSIONER

10  
11 IN WITNESS WHEREOF, I, JAMES MATTHEWS, Executive  
12 Secretary of the Arizona Corporation Commission, have  
13 hereunto set my hand and caused the official seal of  
14 the Commission to be affixed at the Capitol, in the  
City of Phoenix, this 16 day of January, 1991.

15   
16 JAMES MATTHEWS  
EXECUTIVE SECRETARY

17  
18 DISSENT \_\_\_\_\_  
19 CKH:11  
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BEFORE THE ARIZONA CORPORATION COMMISSION

DOCKETED

AUG 22 1990

MARCIA WEEKS  
CHAIRMAN  
RENZ D. JENNINGS  
COMMISSIONER  
DALE H. MORGAN  
COMMISSIONER

DOCKETED BY

*JK*

IN THE MATTER OF THE APPLICATION OF )  
SMITH BAGLEY, INC. FOR A CERTIFICATE )  
OF PUBLIC CONVENIENCE AND NECESSITY TO )  
OPERATE A CELLULAR TELEPHONE SYSTEM TO )  
SERVE THE NAVAJO, ARIZONA RURAL SERVICE )  
AREA AND FOR APPROVAL OF ITS WHOLESALE )  
TARIFF. )

DOCKET NO. U-2556-90-103

DECISION NO. 57073

OPINION AND ORDER

DATES OF HEARING: June 29, 1990 and July 24, 1990

PLACE OF HEARING: Phoenix, Arizona

PRESIDING OFFICER: Cheryl K. Hachman

APPEARANCES: STEPTOE & JOHNSON, by Mr. Barry J. Dale, and ELLIS  
BAKER & PORTER, by Mr. Richard L. Sallquist, on  
behalf of Smith Bagley, Inc.;

JOHNSTON MAYNARD GRANT & PARKER, by Mr. Michael M.  
Grant, on behalf of Arizona RSA3 South Limited  
Partnership; and,

Ms. Elizabeth A. Kushibab, Staff Attorney, Legal  
Division, Arizona Corporation Commission, on behalf  
of the Utilities Division of the Arizona Corporation  
Commission.

BY THE COMMISSION:

On April 16, 1990, Smith Bagley, Inc. ("SBI"), a District of Columbia corporation authorized to do business in Arizona, filed with the Arizona Corporation Commission ("Commission") an application for a certificate of public convenience and necessity ("certificate") authorizing it to construct, operate and maintain cellular radio facilities for the provision of telephone service, as a common carrier, in an area defined by the Federal Communications Commission ("FCC") as the Navajo Arizona Rural Service Area, RSA AZ-3, Cellular Market No. 320 (the "Navajo RSA") which consists of Navajo and Apache Counties,

1 Arizona. SBI also asked for approval of its initial tariff for wholesale  
2 service to other cellular common carriers and resellers.

3 In accordance with A.R.S. §40-282(C), on June 11, 1990, the Commission  
4 issued a notice of hearing setting June 29, 1990 as the hearing date on SBI's  
5 application. SBI failed to publish notice of the June 29, 1990 hearing date.  
6 Therefore, although testimony and closing arguments were presented at the June  
7 29, 1990 hearing, the Presiding Officer continued the hearing to July 24, 1990  
8 and required publication of notice of that hearing date. The Presiding Officer  
9 also granted the application to intervene previously filed by the Arizona RSA3  
10 South Limited Partnership (the "South Partnership"), the Type B licensee in the  
11 Navajo RSA.

12 After the hearing was adjourned on July 24, 1990, SBI filed and served on  
13 all parties a proposed order for consideration by the Presiding Officer. In a  
14 letter filed on July 26, 1990, the South Partnership, in two sentences, noted  
15 that SBI's proposed order failed to mention the dispute regarding SBI's  
16 proposed minimums for resellers (100 numbers and 200 hours of use) and stated  
17 that, consistent with South Partnership's argument at the hearing on SBI's  
18 application and with the Commission's decision in Chronicle Publishing Co.,  
19 Decision No. 57035 (July 19, 1990), SBI's minimum should be reduced to 25  
20 numbers and 50 hours.

21 On July 31, 1990, SBI filed a two-page response to South Partnership's  
22 letter. In that response SBI reiterated or made additional arguments which  
23 were or could have been made in its closing argument and its proposed order,  
24 attempted to distinguish Decision No. 57035 and, citing Century Yuma Cellular  
25 Corp., Decision No. 57032 (July 19, 1990), agreed to reduce its proposed  
26 minimum to 50 numbers and 100 hours, with additional service provided to  
27 resellers in blocks of 25 numbers and 50 hours.

28 . . .



DISCUSSION

As indicated in the foregoing procedural history, the only area of disagreement in this proceeding was between SBI and the South Partnership and centered around SBI's proposed minimum resale obligations. In brief, it is the South Partnership's position that is not reasonable to expect resellers to take a minimum number of 100 numbers and 200 hours of use when SBI's expected number of cellular end-users in its "home market" area during its first operating year is only 94. On the other hand, SBI's witness testified that the proposed 100/200 minimums can be justified on the ground of administrative simplicity. In its July 31, 1990 letter, SBI agreed to reduce the minimums to 50 numbers and 100 hours, on the ground that these minimums were approved by the Commission when it approved the proposed initial tariff of Century Yuma Cellular Corp. ("Century Yuma").

As our Chronicle decision suggests, the size of the resale minimums should bear some relationship to the size of the resale market. For example, in Advanced Mobile Phone Service, Inc.,<sup>1</sup> Decision No. 54122 (July 19, 1984), we approved minimums of 100 numbers and 200 hours on the grounds that they would ensure the marketing of cellular service in economical blocks and prevent proliferation of "'nickel and dime'" resellers in the Phoenix, Arizona metropolitan area. In Tucell Partnership, Decision No. 54506 (July 19, 1985) and Tucson Cellular Tel. Co., Decision No. 54750 (November 13, 1985), the lower minimums proposed by the Tucson, Arizona wholesale carriers (50 numbers and 100 hours) were not opposed and were approved, without discussion, when the Commission approved the carriers' proposed tariffs. Subsequently, in U.S. West

---

1. In Decision No. 53864 (December 27, 1983), the Commission transferred the certificate which had been granted to Advance Mobile Phone Service, Inc. to NewVector Communications, Inc., which subsequently changed its name to US West NewVector Group, Inc. ("NewVector").

1 NewVector Group, Inc., Decision No. 55589 (June 4, 1987), the Commission  
2 allowed NewVector to reduce its minimums to 50 numbers and 100 hours, on the  
3 explicit ground that these minimums had been approved for the Tucson carriers.  
4 We thereby implicitly recognized that, although the size of the end-user markets  
5 in Phoenix and Tucson may differ, both markets are large enough that the  
6 difference need not be reflected in the reseller minimums.<sup>2</sup>

7 In Century Yuma, supra, we approved use of the Tucson minimums in the  
8 Yuma, Arizona area, without discussion, because they were not opposed and  
9 Century Yuma provided evidence that, via resale, it expected to provide service  
10 to approximately 458 end-users during its first year of operation and by the  
11 end of the fifth year it would be providing service to approximately 3,318  
12 customers. Thus, although the potential size of the Yuma market is  
13 considerably smaller than the Tucson and Phoenix markets, it could not be  
14 concluded that use of the Tucson minimums was unreasonable per se and would  
15 preclude entry of competing resellers by a reseller (Century Yuma) which also  
16 owns and operates the necessary wholesale facilities.

17 On the other hand, in Chronicle, supra, Chronicle Publishing Company  
18 ("Chronicle") proposed use of the Phoenix minimums (100 numbers and 200 hours)  
19 in its "home market" (Casa Grande and Florence, Arizona), that proposal was  
20 opposed and Chronicle estimated that, via resale, it expected to provide  
21 service to only 35 retail customers during the first year of operation and  
22 approximately 520 customers by the end of the fifth year. Therefore, in light  
23

24 2. In Decision No. 55336 (December 17, 1986), the Commission denied the  
25 proposal of Metro Mobile CTS of Phoenix, Inc. ("Metro Mobile") to reduce  
26 its reseller minimums from 100 numbers and 200 hours to 50 numbers and 100  
27 hours, on the ground that the reduction would effectively exceed the 50  
28 percent discounting authority of Metro Mobile and other cellular common  
carriers. As a result of this Decision, Metro Mobile is the only cellular  
carrier in Arizona which still uses the original Phoenix minimums approved  
in Decision No. 54122.

1 of the small size of Chronicle's potential "home market" and the practical need  
2 for some minimums (to establish a distinction between retail and wholesale  
3 service), we approved 10 numbers and 20 hours during Chronicle's first year and  
4 25 numbers and 50 hours thereafter, until otherwise ordered. Contrary to SBI's  
5 argument in its July 31, 1990 letter, our approval of the Chronicle minimums  
6 was not premised on the proximity of the Gila RSA to the Phoenix or Tucson  
7 metropolitan areas. Rather, it was premised on the fact that for the small  
8 "nickel and dime" retail market in the Gila RSA, use of either the Phoenix or  
9 Tucson minimums could not be justified.

10 With respect to its "home market" (Holbrook and, in the future, Show Low,  
11 Winslow and Sanders, Arizona), SBI expects that, via resell, it will provide  
12 service to approximately 94 customers during its first operating year, 150  
13 customers in the second, 200 customers in the third, 449 customers in the  
14 fourth and 666 customers in the fifth. Thus, while SBI's resale market may be  
15 larger than Chronicle's, it obviously will be a small fraction of the size of  
16 the Phoenix and Tucson markets and less than half the size of the Yuma market.  
17 Therefore, in light of the relative size of SBI's home market, reasonable  
18 minimums would be 25 numbers and 50 hours during SBI's first three years of  
19 operation. Any increase in the minimums after three years will be considered  
20 by the Commission upon an appropriate application by SBI.

#### 21 FINDINGS OF FACT

22 1. On April 16, 1990, SBI filed an application for a certificate  
23 authorizing it to construct, operate and maintain cellular radio facilities for  
24 the provision of telephone service, as a common carrier, in the Navajo RSA.

25 2. On June 25, 1990, the South Partnership filed an application to  
26 intervene as a party, which was not opposed by SBI and was granted by the  
27 Presiding Officer at the hearing on June 29, 1990.

28 3. Notice of SBI's application and the hearing thereon was published in

1 the Arizona Republic, a newspaper of general circulation in Arizona, on  
2 July 12, 1990.

3 4. The FCC has previously found that a public need exists for cellular  
4 telephone service throughout the country, including the Navajo RSA.

5 5. On March 13, 1989, the FCC issued a construction permit authorizing  
6 construction of cellular facilities in the Navajo RSA to Mr. Smith Bagley and  
7 on May 8, 1989, it granted its consent to the assignment of that permit to SBI.

8 6. Under the FCC's regulations, SBI must obtain a certificate and  
9 complete construction of a cell site in an FCC-approved cellular geographic  
10 service area ("CGSA") within the Navajo RSA by September 13, 1990.

11 7. SBI initially intends to construct one cell site and provide  
12 cellular telephone service: (a) to the residents of Holbrook, Arizona; (b)  
13 along Interstate 40 from approximately 22 miles west of Holbrook to  
14 approximately 24 miles east of Holbrook; and (c) along Arizona Highway 77  
15 approximately 16 miles south of Holbrook.

16 8. In the near future SBI intends to construct additional cell sites  
17 and expand its service to other areas along Interstate 40 and Highway 77 (e.g.,  
18 Winslow, Sanders and Show Low, Arizona) as circumstances permit.

19 9. Due to the nature of the Navajo market, SBI expects that most of its  
20 revenues will be generated by wholesale service, particularly roamer service  
21 for cellular users from other states who are traveling through Arizona on  
22 Interstate 40.

23 10. SBI has agreed to provide wholesale service to the South Partnership  
24 and negotiate an NXX placement agreement to meet the Partnership's service  
25 requirements.

26 11. SBI estimates that, through resale by its agents and wholesale  
27 customers, it will provide service to approximately 94 "home market" customers  
28 during the first year of operation and that by the end of the fifth year it

1 will provide service to approximately 666 such customers.

2 12. SBI has entered into a contract with NovAtel Communications, Inc.  
3 ("NovAtel") for the purchase of a cellular telephone system and, when the  
4 system is delivered, SBI will begin construction immediately so that it can  
5 complete construction before its FCC permit expires.

6 13. For managerial and technical expertise, SBI has entered into a  
7 management contract with FGI Cellular Management Inc. ("FGI"), a corporation  
8 recently created to provide inexperienced owners of the FCC's cellular permits  
9 with management services by those who do have experience with building and  
10 operating cellular telephone systems.

11 14. SBI will not require a franchise for the use of public streets,  
12 highways and rights-of-way for cellular facilities.

13 15. For the land-line portion of its service (local, intralata,  
14 interlata and interstate), SBI initially intends to enter into an  
15 interconnection agreement with Contel of the West, Inc. (Contel West) and, as  
16 it expands its actual service area, to enter into such an agreement with The  
17 Mountain States Telephone and Telegraph Company.

18 16. If granted a certificate, SBI will familiarize itself with the  
19 statutes governing public service corporations and the rules and regulations of  
20 this Commission and intends to abide by them.

21 17. If the Commission permits it to do so, SBI will maintain its books  
22 and records in accordance with the FCC's new Uniform System of Accounts ("Part  
23 32").

24 18. At September 30, 1989, SBI's total assets were cash in the amount of  
25 \$1,000 and its FCC permit, with a book value of \$360, and were funded by equity  
26 capital (in the amount of \$1,360) provided by its sole shareholder, Mr. Bagley.

27 19. To finance construction and initial operation of its cellular  
28 telephone system, SBI has obtained a line of credit from NovAtel in the

1 amount of \$2,595,000 and will draw on that line of credit from time to time by  
2 issuing promissory notes when funds are needed for construction and operating  
3 expenses.

4 20. In essence, SBI's witness testified that the practical equivalent of  
5 100 percent debt financing is available for construction of new cellular  
6 telephone systems at a reasonable interest rate because of the peculiar nature  
7 of the cellular industry and its potential long-term growth.

8 21. SBI expects to operate at a loss during its first four years and in  
9 addition to using its line of credit with NovAtel, it expects that its  
10 shareholder will provide equity funds for operating expenses, via negative  
11 retained earnings.

12 22. On July 1, 1988, Mr. Bagley obtained a firm financial commitment for  
13 a personal loan in the amount of \$2.5 million dollars to cover the cost of  
14 constructing and operating cellular telephone systems in rural areas, in the  
15 event he obtained any FCC permits.

16 23. In connection with the application for assignment of the  
17 construction permit, SBI and Mr. Bagley provided financial information to the  
18 FCC, and when the FCC consented to the assignment of the permit to SBI, it  
19 implicitly found that SBI is financially, as well as technically, qualified to  
20 construct and operate a cellular telephone system.

21 24. SBI's proposed wholesale tariff sets forth its maximum rates and  
22 includes a provision which would permit changes in the rates to reflect  
23 discounts within the range of 0 to 50 percent, but does not include an  
24 effective price sheet containing its initial rate discounts.

25 25. Potential resellers of cellular telephone service must have  
26 reasonable notice of the discounts to be applied, by an effective price sheet,  
27 to individual tariffed services.

28 26. SBI's proposed tariff would provide 15 days notice of changes in

1 applicable discounts.

2 27. Requiring resale minimums of 100 numbers and 200 hours of use, as  
3 initially proposed by SBI to minimize its administrative costs, would  
4 effectively preclude resale, although minimums of 50 numbers and 100 hours may  
5 be appropriate as the Navajo RSA market matures.

6 28. A minimum of 25 numbers and 50 hours of use, as requested by the  
7 South Partnership, would allow for more than one reseller and would be  
8 appropriate during SBI's first three years of operation.

9 29. As initial rates for service in a competitive market, and with 15  
10 days notice of the initial effective prices and the reduction in the minimum  
11 resale numbers and usage, SBI's proposed rates are just and reasonable.

12 30. The Commission's Utilities Division ("Staff") recommended that the  
13 Commission grant SBI's application for a certificate, approve SBI's proposed  
14 tariff and order SBI to:

15 (a) file Contel West's interconnection agreement for  
16 access service to SBI<sup>3</sup> and all future  
17 interconnection agreements with land-line carriers;

18 (b) file the maintenance agreement between FGI and the  
19 local on-site maintenance organization;

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26 3. In addition, since it is providing access service to SBI pursuant to a  
27 special contract rather than its tariff, Contel West must file the contract  
28 in accordance with A.R.S. §§40-365, 40-367 and 40-250(B) and presumably  
will do so.

- 1 (c) maintain separate books and records for its  
2 wholesale operations;  
3 (d) file a copy of any application to the FCC to expand  
4 its CGSA;  
5 (e) in the event SBI does business under an assumed  
6 name, notify the Commission of the name;  
7 (f) file the toll free number of FGI's headquarters in  
8 Atlanta, Georgia; and  
9 (g) file the technical descriptions of the type I and  
10 II interfaces with Contel West.

11 31. With Staff's agreement to deletion of information SBI considers  
12 confidential or proprietary from the copy of the local maintenance agreement  
13 filed in the public record of this proceeding, SBI agreed with Staff's  
14 recommendations.

15 CONCLUSIONS OF LAW

16 1. SBI is a public service corporation within the meaning of Article XV  
17 of the Arizona Constitution and A.R.S. §40-281.

18 2. The Commission has jurisdiction over SBI and of the subject matter  
19 of the application.

20 3. There exists a public necessity for a cellular telephone system  
21 within the Navajo RSA.

22 4. SBI is a fit, willing and able party to provide such cellular  
23 telephone service.

24 5. SBI should be granted a certificate authorizing it to construct,  
25 operate and maintain cellular radio facilities for provision of telephone  
26 service as a common carrier within the Navajo RSA, as authorized by the FCC.

27 6. Prospective resellers of SBI's services should receive at least 15  
28 days notice of the actual effective price for each service.



7. SBI's proposed resale minimums are unjust and unreasonable and should be reduced to a level allowing for competitive provision of resale of cellular service to end-users within the Navajo RSA.

8. SBI's proposed minimum resale block of numbers and usage should be reduced to 25 numbers and 50 peak hours until otherwise ordered by the Commission.

9. As initial rates for service in a competitive market, and with 15 days notice of the initial prices and the reduction in the minimum resale numbers and usage, SBI's proposed rates are just and reasonable.

10. SBI should be granted permission to keep its books and records in accordance with Part 32.

11. In view of the facts and circumstances set forth hereinabove, Commission approval of SBI's line of credit with NovAtel and the issuance of promissory notes pursuant thereto is not required.

12. Nothing herein should be construed in any way as approval of or a determination on the reasonableness of SBI's method of financing its cellular telephone plant and operations and its cost of capital for ratemaking purposes.

13. The Staff recommendations set forth in Finding of Fact 9 (a) through (g) were not opposed and should be adopted.

## ORDER

IT IS THEREFORE ORDERED that Smith Bagley, Inc. be, and hereby is, granted a certificate of public convenience and necessity authorizing it to construct, operate and maintain cellular radio communications facilities for the provision of telephone service as a common carrier within the Navajo RSA.

IT IS FURTHER ORDERED that the certificate of public convenience and necessity granted hereinabove be, and hereby is, subject to the condition that it is contingent upon, coextensive with and identical to the authority granted to Smith Bagley, Inc. by the Federal Communications Commission.